SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 358

IN THE MATTER OF

The Claim for Compensation under the Workmen's Compensation Law made by

WALTER E. BRAADT,

Appellant,

vs.

THE CITY OF NEW YORK,
Department of Sanitation (self-insurer),

Respondent,

vs.

WORKMEN'S COMPENSATION BOARD,

Respondent.

(W. C. B. No. 05994124)

JURISDICTIONAL STATEMENT

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IN THE

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No.

IN THE MATTER

OF

THE CLAIM FOR COMPENSATION UNDER THE WORKMEN'S COMPENSATION LAW MADE BY

WALTER E. BRAADT,

Appellant,

vs.

THE CITY OF NEW YORK, DEPARTMENT OF SANITATION (self-insurer),

Respondent,

vs.

WORKMEN'S COMPENSATION BOARD,

Respondent.

(W.C.B. No. 05994124)

Jurisdictional Statement

(a) Official and unofficial reports of the opinons delivered in the Courts below:

Workmen's Compensation Board State of New York, memorandum of decision filed June 5, 1963, W.C.B. Case

No. 05994124; affirmed Appellate Division, Third Department, 21 App. Div. 2d 957; 251 N. Y. S. 2d 376 (3rd Dept. N. Y. 1964); aff'd, Court of Appeals, no opinion; 15 N. Y. 2d 875, 258 N. Y. S. 2d 413 (1965).

Memoranda opinions of Workmen's Compensation Board and Appellate Division, Third Department, appended hereto as Appendices A and B respectively.

(b) The grounds upon which the jurisdiction of this Court in invoked:

(i) Appellant-seaman, upon learning that the waterways where his accident occurred, were in fact navigable waters and not non-navigable as he was erroneously led to believe by misrepresentations of his employer, The City of New York, made application to the New York State Workmen's Compensation Board to review and vacate, on jurisdictional grounds, compensation proceedings and awards made to appellant-seaman under the New York State Workmen's Compensation Law.

The Workmen's Compensation Board denied appellant-seaman's application, holding that the Board had jurisdiction as appellant had utilized the Board's machinery at a series of hearings, resulting in a series of awards, as well as payment and acceptance of these awards. Appellant-seaman, appealed to the Appellate Division, Third Department, which unanimously affirmed the decision of the Workmen's Compensation Board. The Appellate Division held that pursuant to Section 113 Workmen's Compensation Law, appellant-seaman had waived his admiralty, maritime and federal rights under the Jones Act, 46 U. S. C. § 688.

Appellant-seaman appealed on federal constitutional grounds to the Court of Appeals. Over appellant-seaman's

contention that Section 113 of the New York State Workmen's Compensation Law, on its face and as applied to seaman's admiralty and maritime rights and remedies, is repugnant to Article III, Section 2 of the United States Constitution, the Court of Appeals affirmed the order of the Appellate Division, Third Department.

(ii) The appellant is appealing from the final order of the Court of Appeals of the State of New York,* entered on the 11th day of March, 1965, unanimously affirming, without opinion the order of the Appellate Division which unanimously affirmed the award and decision made by the Workmen's Compensation Board of the State of New York dated June 5, 1963.

The notice of appeal to the Supreme Court of the United States was filed in the New York Supreme Court, Appellate Division, Third Judicial Department on June 9, 1965.

(iii) Section 1257(2) of Title 28 U. S. C., confers jurisdiction on the Supreme Court of the United States over this appeal.

(iv) Cases believed to sustain this Court's jurisdiction: *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Washington* v. *Dawson & Co.,* 264 U. S. 219; *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58; *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375; *The Lottawana,* 88 U. S. 588.

Compare *South Buffalo R.R. Co.* v. *Ahern,* 344 U. S. 367; *Grant Smith-Porter Shipping Co.* v. *Rhodes,* 257 U. S. 469; *Calbeck, et al* v. *Travelers Insurance Co.,* 370 U. S. 114; *Gahagan Construction Corp.* v. *Armao,* 165 F. 2d 301 (1st Cir. 1948), cert. den'd. 333 U. S. 876; *W. J. McCahan Sugar & Molasses Refining Co.,* v. *Stoeffel,* 41 F. 2d, 651 (3rd Cir. 1930); *Schellenger* v. *Zubik,* 170 F. Supp. 92, (D. C. Pa. 1959).

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* See Appendix C, p. 16 *infra.*

(v) The text of Section 113 New York State Compensation Law is as follows:

> "The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."
>
> *McKinney's Consolidated Laws of New York,* Book 64, Part 2, p. 287.

(c) The questions presented by this appeal are as follows:

1. Whether the application of the waiver of Federal admiralty "rights and remedies" provision of Section 113, New York State Workmen's Compensation Law, to appellant-seaman's rights under the General Maritime Law and Jones Act, 46 U. S. C., § 688, is repugnant to and violates Article III, Sec. 2 of the United States Constitution?

2. Whether rights and remedies for seamen injured in the course of their employment on navigable waters are, by virtue of Article III, Sec. 2 of the United States Con-

stitution, exclusively within the Federal admiralty and maritime jurisdiction to the exclusion of and superseding the operation of the New York State Workmen's Compensation Law?

3. Whether there is a "maritime but local" exception to the paramount Federal maritime and admiralty jurisdiction over seamen injured in the course of their employment on navigable waters, where New York State can constitutionally apply it's Workmens Compensation Law?

4. Whether appellant-seaman, relying on a misrepresentation of his employer, The City of New York, that the waters where the accident occurred were non-navigable, can expressly or impliedly waive, pursuant to Section 113 of the New York State Workmen's Compensation Law his constitutional, (Article III, Sec. 2), and federally protected rights under the General Maritime Law and Jones Act. 46 U. S. C. § 688, by utilizing the machinery of the New York State Workmen's Compensation Board which resulted in a series of awards to appellant.

(d) Statement of the case:

In support of appellant-seaman's application to the Workmen's Compensation Board to set aside and vacate on jurisdictional grounds, the compensation proceedings and awards made to him under the Workmen's Compensation Law, appellant set forth the following facts.

Appellant was injured in an accident on September 20, 1959 while in the course of his employment as a Deckhand aboard a scow in use at the Fresh Kills Disposal Plant, Staten Island, N. Y. The accident occurred when the scow collided with other floating vessels in the Fresh Kills Creek.

Appellant-seaman, employed by the City of New York, Department of Sanitation, accepted New York State Work-

men's Compensation awards in reliance upon a misrepresentation by The City of New York that the accident occurred upon non-navigable waterways.

Appellant did not have occasion to question this representation as to non-navigability of the waterways where the accident occurred until the summer of 1962 when he ascertained that the said waterways were navigable. An action was then instituted in the United States District Court, Southern District of New York, under he Jones Act and General Maritime Law, against The City of New York on appellant-seaman's behalf.

At the hearing before the Workmen's Compensation Board, The City of New York admitted that the waterways where the accident occurred were in fact navigable; the City now contending that appellant was not a seaman within the meaning of the General Maritime Law and Jones Act (41).*

The Workmen's Compensation Board denied appellant's request to take testimony on the issue of whether appellant was in fact a seaman at the time of the accident (40) holding:

> "* * * On review we find that the New York State Workmen's Compensation Board has jurisdiction in this matter. Here as in the case of *Meacham* v. *New York Central Railroad Co.*, (23 CCD1-P.7), the parties have utilized the Board's machinery at a series of hearings resulting in a series of awards, as well as payment and acceptance of these awards. We further find that these awards should not now be set aside." (14).

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* Numbers in parentheses refer to the pages of the transcript of the record.

Appellant-seaman contended in his arguments before the Appellate Courts that: A seaman's rights under the Jones Act and General Maritime Law, promulgated pursuant to Article III, Section 2 of the Constitution of the United States, are exclusive and paramount, superseding the operation of the New York State Workmen's Compensation Law.

The Appellate Division* gave no direct answer to this contention and argument.

However, as to appellant's contention that there is no "maritime but local" exception to the exclusive Federal maritime and admiralty jurisdiction over seaman whereby a state can constitutionally apply its Workmen's Compensation Law, the Appellate Division, cited as authority for its decision in the instant case *Grant Smith-Porter Shipping Co.* v.-*Rhodes,* 257 U. S. 469. This case held that there was a maritime but local exception to the Federal government's exclusive admiralty and maritime jurisdiction.

Section 113 Workmen's Compensation Law is in effect based on this "maritime but local" doctrine.

The decision of the Appellate Division stands for the proposition that a seaman, relying on as misrepresentation of his employer that the waterways where the accident occurred were non-navigable, can nevertheless expressly or impliedly waive, pursuant to Section 113 of the New York State Workmen's Compensation Law, his constitutional and Federally protected rights under the General Maritime Law and Jones Act by utilizing the machinery of the New York State Workmen's Compensation Board.

---

* The decision of the Appellate Division was affirmed by the Court of Appeals without opinion.

Appellant's arguments that Section 113 of the Workmen's Compensation Law on its face and as applied to a seaman's rights and remedies, is repugnant to Article III, Section 2 of the United States Constitution, was rejected without discussion. The Appellate Division simply held that:

> "* * * Upon this record, the Board was not bound to find either the employment or waiver under Section 113 within the rule which holds invalid a waiver or waiver statute which 'contravenes the essential purpose expressed by an Act of Congress, or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations'. * * *" (12)

This Court has repeatedly held that its appellate jurisdiction is properly invoked to review the judgment, orders and decisions of the highest court of the State, which has upheld a State statute against contentions that on the face and as applied, the statute violated the Federal Constitution. *Bantam Books, Inc.* v. *Sullivan,* 374 U. S. 58.

(e) The Federal questions presented in this appeal are determinative factors of the inherent boundaries of the General Maritime Law, and as such are of so substantial nature as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

The issues presented are of first impression to this Court; have a direct effect not only upon the entire shipping industry's employer-seaman-employee relationship, but on the characteristic features of the General Maritime Law, which has been incorporated into Article III, Section 2 of the United States Constitution and is part and parcel thereof. *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375.

It is the function of the Supreme Court to declare the General Maritime Law and its inherent boundaries, which cannot be altered by legislation or by the parties themselves. *The Lottawana,* 88 U. S. 588; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375.

In *South Buffalo Co.* v. *Ahern,* 344 U. S. 367, the appellate jurisdiction of this Court was invoked to determine if Section 113 of the New York Workmen's Compensation Law was repugnant to the commerce clause of the United States Constitution, and whether this Section transgressed the Federal Employees Liability Act, 45 U. S. C., Sec. 51, *et seq.*

This Court held that because of the permissive nature of Section 113 of the New York State Workmen's Compensation Law, the Section did not transgress the Federal Employees Liability Act, and it was not repugnant to the commerce clause of the United States Constitution. The Court stated:

> "... untainted by fraud or overreaching, full and fair compromise of Federal Employees Liability Act claims do not clash with the policy of the Act. ... The validity of such an agreement raises a federal question to be resolved by federal law." *South Buffalo Railroad Co.* v. *Ahern,* 344 U. S. at p. 372.

As in the *Ahern* case, *supra,* we again have constitutional federal questions being raised concerning Section 113 of the New York State Workmen's Compensation Law but this time with respect to a seaman's admiralty rights and remedies.

The authority relied upon by the Appellate Division to support the compensation awards, *Grant Smith-Porter Shipping Co.* v. *Rhodes,* 257 U. S. 469, enunciates the "mari-

time but local'' doctrine whereby the States may constitutionally apply their Workmen's Compensation Laws to injuries occurring on navigable waterways. Heretofore, this doctrine has never been applied to a seaman's ''case''. *Gahagan Construction Corp.* v. *Armao,* 165 F. 2d 301 (1st Cir. 1948), *cert. den'd* 333 U. S. 876. With respect to longshoremen and harbor workers, the doctrine is now in serious disrepute. *Calbeck et al* v. *Travelers Insurance Co.,* 370 U. S. 114.

Federal courts have held that seamen have no compensation remedy—State or Federal. The efforts of a State to impose workmen's compensation on seamen are unconstitutional and void irrespective of the fairness of the agreement. *W. J. McCahan Sugar Refining & Molasses Co.* v. *Stouffel,* 41 F. 2d 651 (3rd Cir. 1930); *Schellenger* v. *Zubik,* 170 F. Supp. 92 (D. C. Pa. 1959).

This Court should not permit the ''maritime but local'' doctrine of *Grant Smith-Porter Shipping Co., supra,* to be extended to seaman's rights and remedies, and this doctrine should be reversed with respect to all admiralty rights and remedies.

The rulings and the decision of the Appellate Division, affirmed without opinion by the Court of Appeals clearly brings this case within the jurisdictional provision conferring appellate jurisdiction on this Court.

Respectfully submitted,

WILLIAM GITNICK,
Counsel of Record for Appellant.

KLEIN and HIRSCHBERGER,
Attorneys for Appellant,
George L. Platt,
Of Counsel.

APPENDIX A

Workmen's Compensation Board, Memorandum of Decision filed June 5, 1963

WORKMEN'S COMPENSATION BOARD
STATE OF NEW YORK

Before a Panel of three Members on March 27, 1963.
Present:

FREDERIC E. HAMMER, Presiding
FRANK GRASSO
ISIDORE SIEGELTUCH

In the Matter

of

WALTER E. BRAADT,

vs.

CITY OF NEW YORK DEPT. OF SANITATION.

W. C. B. Case
No. 05594124
Carrier's Case
No. 103 50 59 100
Self-insured

MEMORANDUM OF DECISION

Claimant's attorney objects to the Referee decision and awards, contending that all findings of fact and awards of

compensation be set aside and vacated since there is lack of jurisdiction and claimant desires to proceed under the provisions of the Maritime Law.

A claim for compensation, C-3 form, filed 12/21/59, indicates claimant, a sanitation worker, injured his back on 9/20/59 while moving a scow. Awards were made and paid to claimant for intermittent periods of disability from 9/22/59 to 1/29/62 and on 10/11/62 case was closed on a finding of permanent partial disability. Claimant now seeks to withdraw his claim for compensation.

On review we find that the New York State Workmen's Compensation Board has jurisdiction in this matter. Here as in the case of Meachem vs. New York Central Railroad Co. (23 OCD1-p. 7) the parties have utilized the Board's machinery at a series of hearings resulting in a series of awards as well as payment and acceptance of these awards. We further find that these awards should not now be set aside.

The Referee decision and awards are therefore AFFIRMED and the case closed.

All concur.

FREDERIC E. HAMMER

FRANK GRASSO

ISIDORE SIEGELTUCH

APPENDIX B

Decision of the Appellate Division

SUPREME COURT — APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

July 15, 1964. 6678

In the Matter

of

The Claim of WALTER E. BRAADT,

Appellant,

vs.

CITY OF NEW YORK—DEPARTMENT OF SANITATION,

Respondent.

WORKMEN'S COMPENSATION BOARD,

Respondent.

MEMORANDUM BY THE COURT. Claimant, describing himself as a "sanitation man", employed by the Department of Sanitation of respondent City of New York, and as injured while working as a "deckhand on scow", applied for and received workmen's compensation, but now appeals from a decision denying his application to set aside the awards, asserting that the board was without jurisdiction to make them and that he and his employer could not waive his rights under the Jones Act (U. S. Code, tit. 46, §688) whereby a seaman injured in the course of his employment

"may, at his election, maintain an action for damages at law". Respondent employer contends that the awards were properly made under section 113 of the Workmen's Compensation Law providing that awards of compensation "may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies".

Claimant stated that he worked on boats and on scows, cranes and other floating equipment "maybe two or three days a week" and that the rest of the time he worked with boilermakers, on land. On the day of the accident he was assigned to painting work. He was injured, as the result of a collision, when about to throw a line to assist in moving a scow which had caught fire.

Citing *Matter of Meachem* v. *New York Cent. R.R. Co.* (8 N Y 2d 293), the board based its determination of jurisdiction on its finding that "the parties have utilized the Board's machinery at a series of hearings resulting in a series of awards as well as payment and acceptance of these awards." These facts are not disputed. Additionally, claimant, having filed his claim on December 21, 1959, was represented after August 8, 1960 by his present attorneys, who appeared at hearings of December 16, 1960 and October 11, 1962 and until the latter date did not question jurisdiction or raise the present contention that claimant had mistakenly believed that Fresh Kills Creek, Staten Island, where the accident occurred, was non-navigable and that in consequence he was restricted to workmen's compensation; and this although his attorneys are also proctors in admiralty.

Contrary to appellant's contention, the principles stated in *Meachem, supra,* and in *Matter of Ahern* v. *South Buf-*

falo Ry. Co. (303 N. Y. 545, affd. 344 U. S. 367) are, in our view, applicable to this accident on a scow, and are not limited to waivers of liability arising out of cases which might otherwise be sued under the Federal Employees' Liability Act. Interestingly enough, the maritime act itself, in another context, makes reference to "cases of personal injury to railway employees." (U. S. Code, tit. 46 § 688.) Upon this record, the board was not bound to find either the employment or the waiver under section 113 within the rule which holds invalid a waiver or a waiver statute which "contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the General Maritime Law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." (*Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 216.) The awards were proper, upon the entire record, and are supported by authority. (See *Grant Smith-Porter Ship. Co.* v. *Rhode*, 257 U. S. 469; *Matter of Haglund* v. *Morse Dry Dock & Repair Co.*, 255 App. Div. 895; *Herbert's Case*, 283 Mass. 348.)

Decision affirmed, without costs.

GIBSON, P. J. HERLIHY, REYNOLDS, TAYLOR and HAMM, JJ., concur.

APPENDIX C

Order Appealed From of Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of March in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,

Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTUR: March 11, 1965.

No. 408

IN THE MATTER

OF

THE CLAIM FOR COMPENSATION &C. MADE BY WALTER E. BRAADT,

Appellant,

vs.

THE CITY OF NEW YORK SANITATION DEPARTMENT (self-insurer)

Respondent.

Appendix C

BE IT REMEMBERED, That on the 26th day of October, in the year of our Lord one thousand nine hundred and sixty-four, Walter E. Braadt, the appellant—in this cause, came here unto the Court of Appeals, by Klein & Hirschberger, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And the City of New York—Department of Sanitation (self-insurer), the respondent—in said cause, afterwards appeared in said Court of Appeals by Leo A. Larkin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. George L. Platt, of counsel for the appellant—, and by Mr. Benjamin Offner, of counsel for the respondent City, and by Mr. Morris N. Lissauer, of counsel for the respondent Board, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of

the Supreme Court, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Alabny, March 11, 1965.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk

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(2114)

Supreme Court of the United States

OCTOBER TERM, 1965

No. 358

WALTER E. BRAADT,

Appellant,

against

THE CITY OF NEW YORK DEPARTMENT OF SANITATION (Self-Insurer),

Appellee,

and

NEW YORK STATE WORKMEN'S COMPENSATION BOARD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF WORKMEN'S COMPENSATION BOARD TO DISMISS FOR WANT OF JURISDICTION

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 358

WALTER E. BRAADT,

Appellant,

against

THE CITY OF NEW YORK DEPARTMENT OF SANITATION (Self-Insurer),

Appellee,

and

NEW YORK STATE WORKMEN'S COMPENSATION BOARD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF WORKMEN'S COMPENSATION BOARD TO DISMISS FOR WANT OF JURISDICTION

The New York State Workmen's Compensation Board, one of the appellees in the above entitled matter, moves to dismiss the appeal herein on the ground that the Court lacks jurisdiction to hear the appeal in that the appeal presents no substantial federal question; and on the further ground that the appeal states no basis for review under 28 U. S. C. § 1257(2).

Statement

The Appellant, Walter E. Braadt, was employed as a sanitation man by the City of New York in 1950. On September 20, 1959, while so employed, he was injured while on a scow in Fresh Kills Creek, Staten Island.

The employer, one of the Appellees herein, filed a report of this injury with the New York State Workmen's Compensation Board on October 23, 1959 and a claim for compensation benefits was filed with the Board by the claimant, Appellant herein, on December 21, 1959.

Commencing with October 29, 1959, the Appellant was paid compensation by the self-insured employer for disability resulting from his accidental injury and he continued to be paid for subsequent related periods of disability in the aggregate amount of $927, the last payment having been made on March 13, 1962, the last reported date of related disability.

The Appellant had been represented by his present counsel since August, 1960, but it was not until the hearing of October 11, 1962, that the Appellant for the first time asserted that the Workmen's Compensation Board did not have jurisdiction over his claim. The Referee refused to rule on the question as to whether the Board had jurisdiction.

Upon review the Workmen's Compensation Board held that it had jurisdiction over the claim, citing the fact that the parties had "utilized the Board's machinery at a series of hearings resulting in a series of awards as well as payment and acceptance of these awards."

Appellant then appealed to the Appellate Division of the Supreme Court, Third Judicial Department. In a memorandum decision, that Court unanimously affirmed the

determination of the Workmen's Compensation Board (21 A. D. 2d 957, 251 N. Y. S. 2d 376). The Court upheld the Board's jurisdiction over the claim under New York Workmen's Compensation Law, § 113, stating (pp. 957-958):

> "Citing *Matter of Meacham* v. *New York Cent. R. R. Co.* (8 N. Y. 2d 293) the board based its determination of jurisdiction on its findings that 'the parties have utilized the Board's machinery at a series of hearings resulting in a series of awards as well as payment and acceptance of these awards.' These facts are not disputed. Additionally, claimant, having filed his claim on December 21, 1959, was represented after August 8, 1960 by his present attorneys, who appeared at hearings of December 16, 1960 and October 11, 1962 and until the latter date did not question jurisdiction or raise the present contention that claimant had mistakenly believed that Fresh Kills Creek, Staten Island, where the accident occurred, was nonnavigable and that in consequence he was restricted to workmen's compensation; and this although his attorneys were also proctors in admiralty. Contrary to appellant's contention, the principles stated in *Meacham* (*supra*) and in *Matter of Ahern* v. *South Buffalo Ry. Co.* (303 N. Y. 545, affd. *sub nom. South Buffalo Ry. Co.* v. *Ahern*, 344 U. S. 367) are, in our view, applicable to this accident on a scow, and are not limited to waivers of liability arising out of cases which might otherwise be sued under the Federal Employers' Liability Act. Interestingly enough, the maritime act itself, in another context, makes reference to 'cases of personal injury to railway employees'. (U. S. Code, tit. 46, § 688.) Upon this record, the board was not bound to find either the employment or the waiver under Section 113 within the rule which holds invalid a waiver or a waiver statute which 'contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.' (*Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 216.) The awards were proper, upon the entire record, and are supported by authority.

(See *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469; *Matter of Haglund* v. *Morse Dry Dock & Repair Co.*, 255 App. Div. 895; *Herbert's Case*, 283 Mass. 348.)"

Appellant thereupon appealed to the New York Court of Appeals which unanimously affirmed the Appellate Division decision, without opinion (15 N. Y. 2d 875, 258 N. Y. S. 2d 413 [1965]).

POINT I

The appeal does not fall within the requirements of Subdivision 2 of Section 1257 of Title 28 of the United States Code.

Subdivision 2 authorizes an appeal to the United States Supreme Court from the highest court of a state "where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

This appeal does not directly involve the validity of any statute of New York State. There is no actual question as to the constitutionality of Section 113 of the Workmen's Compensation Law. The sole challenge to this statute is that the Compensation Board and the Courts have held Appellant's acts to constitute a waiver which waiver he claims not to have knowingly made. If this can be construed as raising any constitutional question at all it is submitted that it is one which may only be raised by certiorari and not appeal (28 U. S. C. § 1257[3]), as specifically claiming a right under the United States Constitution.

The constitutional questions nominally raised in this appeal have all previously been decided by this Court, and

Appellant shows no reason for reconsideration or overruling of those decisions at this time.

POINT II

In any event, the appeal fails to raise a substantial federal constitutional question.

The constitutional issues purported to be raised by this appeal relate to the validity of New York Workmen's Compensation Law, § 113 which provides, in part:

> "* * * awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or other interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."

Appellant alleges that the waiver provisions are repugnant to and violate Article III, § 2 of the United States Constitution, which extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction." That section also extends the judicial power to "all Cases, in Law or Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority", yet no one would seriously question the right of a State Court to pass upon federal constitutional questions, subject to appellate review by this Court. Therefore, the provisions of that section are not necessarily exclusive, and without more vest no constitutionally protected rights in individual citizens. Actions under this section may, in many instances, be brought in state as well as federal courts.

The real issue is whether the federal statute preempted the field of maritime compensation to the complete ex-

clusion of the State Courts under Workmen's Compensation Law provisions such as are contained in Section 113. This issue, it is submitted, has been decided by this Court contrary to Appellant's contentions. Consequently, the appeal herein contains no substantial federal constitutional or statutory question.

In *South Buffalo R. Co.* v. *Ahern* (344 U. S. 367 [1953], affirming 303 N. Y. 545), the employee challenged the validity of Section 113 as being in unconstitutional conflict with the Federal Employers' Liability Act (45 U. S. C. § 51 *et seq.*). The employee had been injured while performing duties for his employer, an interstate carrier. His claim was filed with the New York State Workmen's Compensation Board, resisted by his employer on the merits, without any challenge to the Board's jurisdiction, and a compensation award was made. After four years Ahern died and his widow filed a claim for a final disability award. Then, for the first time, the employer challenged the Board's jurisdiction, contending that, as to an employee in interstate commerce, "the applicability of the Federal Employers' Liability Act deprived the Workmen's Compensation Board of jurisdiction" (344 U. S., at pp. 368-369).

When the case was before it on appeal, the New York Court of Appeals had held as to Section 113 (303 N. Y., at p. 554):

> "It provides that if the parties waive their Federal rights and remedies the board may act. If the payment of a final award be deemed the waiver, then there is nothing further for the board to do, and no reason for it to act. Obviously then, section 113 means to do no more than codify the rule which is laid down in the early cases. To our mind, the language of the section and that of the legislative committee which recommended its enactment plainly indicates that it is a

permissive statute intended to empower the board to make awards of compensation if all of the parties elect to settle their dispute in that fashion, and forego their Federal rights and remedies. It is not to be imposed upon them in the absence of a joint waiver or agreement evidencing an intention to be bound by its terms. In thus construing that section, we have been guided by the familiar principle of our jurisprudence that the courts are reluctant, and it is only as a last resort, that they will strike down a solemn legislative enactment on the ground that it is unconstitutional. We believe that the interpretation above given to section 113 of our Workmen's Compensation Law, is clearly the proper interpretation, and that as so construed section 113 does not conflict with the fundamental law of the land."

As to the right to waive federal rights the opinion went on to state (p. 555):

"There is nothing contained in the Constitution of the United States which prohibits, nor has the United States Supreme Court held, that, after an accident, all interested parties may not dispose of their controversy as they themselves see fit, provided that the means whereby such dispute is settled or adjusted does not violate public policy. If all of the parties agree that the employer and carrier will pay and the employee will accept compensation, in the amounts and manner provided by the workmen's compensation statute of a State, rather than resort to litigation and the State has permitted its compensation board to make awards under such circumstances, we can conceive of no valid objection to such an arrangement. If the parties agree on a sum of money to be paid in discharge of the claim for personal injuries, such agreement, if there has been no overreaching or fraud, does not violate any constitutional provision, Federal legislation or announced public policy. Neither is there any sound reason why the parties may not designate an impartial third person or group of persons to determine the amount to be paid in extinguishment of the claim. To our mind that is all that section 113 of the Workmen's Compensation Law purports to accomplish."

In affirming the *Ahern* decision this Court held that Congress had preempted the field of injuries to railroad employees, but it, nevertheless, upheld the jurisdiction of the Board under § 113 of the New York statute (344 U. S., at p. 371):

> "We do not doubt that the Federal Employers' Liability Act, supplanting a patchwork of state legislation with a nationwide uniform system of liberal remedial rules, displaces any state law trenching on the province of the Act. State legislatures, for example, may not intrude into the federal Act's interstate commerce perimeter to destroy uniformity by arbitrarily presuming the renunciation of rights which the Act confers, or by compelling parties to elect between the federal remedies and an alternative state compensation plan. *Erie R. Co.* v. *Winfield*, 244 U. S. 170 (1917). The New York Court of Appeals, however, manifested meticulous care to avoid collision, it construed § 113 of the Workmen's Compensation Law as a mere legislative authorization, permitting the Board to effectuate private agreements for compromising a federal controversy by resort to an impartial umpire —'that is all that section 113 of the Workmen's Compensation Law purports to accomplish.' The difference between coercion and permission is decisive; New York's jurisdictional grant, so confined, does not transgress."

Appellant ignores the clear holding of this Court in *South Buffalo R. Co.* and asserts that the federal remedy is exclusive, that the Workmen's Compensation Board is without jurisdiction, and that jurisdiction cannot be conferred by the parties. His only attempt at distinguishing *South Buffalo* is to say that that case involved the FELA and this one involves the Jones Act. But the Jones Act also is permissive. It provides (46 U. S. C. § 688):

> "Any seaman who shall suffer personal injury in the course of his employment *may, at his election,* maintain an action for damage at law * * *." (Emphasis supplied.)

There is no conflict between the federal and state acts. The remedy provided by the Jones Act is thus not made exclusive, and the seaman may either pursue his remedies under the Jones Act or may elect to pursue the remedy provided in the Workmen's Compensation Law.

The only remaining issue on this appeal is whether Appellant actually waived his federal rights. In this Court he alleges the waiver was procured by fraud. His affidavit to the Board, however, indicates he was at all times aware of the possibility of a federal remedy, he was familiar with the method of classification of navigable waters and in fact retained as counsel a firm of attorneys who are also Proctors in Admiralty. At the first compensation hearing, claimant raised the issue of maritime jurisdiction but states that he relied upon the statement of the corporation counsel of the City of New York, representing both the employer and insurance carrier, that Fresh Kills Creek was non-navigable. He also discussed the question with his attorneys who also passed it off on the basis of the city's statement. Either one at that time could have discovered the alleged truth by a phone call to the U. S. Coast Guard and, yet neither saw fit to do so. On this record, it is submitted, the Courts were clearly justified in finding a conscious waiver of any federal rights. Furthermore, claimant and his attorneys appeared at various hearings from 1960 on, yet not until the hearing of October 11, 1962, called for the purpose of final classification as to the permanency of the disability, was any question raised as to jurisdiction.

As in the *South Buffalo* case, the objecting party was guilty of a "long delayed change of heart" (344 U. S., at p. 373).

It is submitted that the Jurisdictional Statement herein presents no issue within the jurisdiction of this Court on

appeal; and, even if the appeal were to be treated as a petition for certiorari, no ground has been shown for granting of relief on that basis.

CONCLUSION

The appeal herein should be dismissed for lack of jurisdiction to hear the appeal on the ground that no substantial federal question is presented, and on the further ground that the Jurisdictional Statement presents no ground for review under 28 U. S. C., § 1257(2).

Dated: July 29, 1965.

Respectfully submitted,

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(38069)

IN THE

Supreme Court of the United States

October Term, 1965

No. 358

In the Matter of

the claim for Compensation under the Workmen's Compensation Law made by WALTER E. BRAADT,

Appellant,

vs:

THE CITY OF NEW YORK, DEPARTMENT OF SANITATION (Self-insurer),

Appellee,

WORKMEN'S COMPENSATION BOARD,

Appellee.

(W. C. B. No. 05994124)

MOTION TO DISMISS

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IN THE

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(Self-insurer),
Appellee,

WORKMEN'S COMPENSATION BOARD,
Appellee.

(W. C. B. No. 05994124)

MOTION TO DISMISS

Appellee The City of New York moves, pursuant to Rule 16(1)(b) of the Revised Rules of this Court, to dismiss this appeal from the final order and judgment of the New York Court of Appeals which affirmed an order of the Appellate Division of the New York Supreme Court, Third Department, affirming a decision of the Workmen's Compensation Board of the State of New York which denied the claimant-appellant's application to vacate awards of compensation allowed to and received by the claimant.

The notice of appeal states that the appeal is taken pursuant to 28 U. S. C. §1257(2), which authorizes an appeal to this Court from a final judgment of the highest court of a State in which a decision could be had where there "is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The instant motion to dismiss the appeal is based upon the ground that the appeal does not present a substantial constitutional question because the sole question raised by this appeal, the constitutionality of New York Workmen's Compensation Law, §113, was determined by this Court in *South Buffalo R. Co.* v. *Ahern,* 344 U. S. 367 (1953). Reported below: 21 A D 2d 957, 251 N. Y. S. 2d 376; 15 N Y 2d 875, 206 N. E. 2d 349.

Statute Involved

Section 113 of the Workmen's Compensation Law of the State of New York (McKinney's Consolidated Laws of New York, Book 64, Part 2, page 287) provides as follows:

> The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, provided that awards according to the provisions of this chapter may be made by the board in respect of

injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter.

Statement

The City of New York (Department of Sanitation) was the appellant's employer and self-insurer. The appellant, with the civil service title of Sanitation Man, was injured on September 20, 1959, while on a scow in Fresh Kills Creek, Staten Island. On December 21, 1959, he filed a claim for compensation with the Workmen's Compensation Board and retained his present counsel (or a predecessor firm of attorneys) to represent him before the Board. The retainer of such counsel was filed with the Board on August 3, 1960 (24, 25, 28, 41).*

Hearings on the claim for compensation were held before the Board's referees on April 1, 1960, June 17, 1960, December 16, 1960, March 17, 1961, October 27, 1961, December 1, 1961, February 16, 1962 and October 11, 1962. On the latter date the case was closed, claimant having worked continuously since January 29, 1962. He was represented by counsel at the hearings held on December 16, 1960 and October 11, 1962 (16, 31, 34, 37).

Compensation was awarded the claimant from time to time, aggregating $927. It is not disputed that the compen-

* Unless otherwise noted, figures in parentheses refer to pages of the transcript of the record.

sation awarded has been received by the claimant. Although the compensation covered intermittent periods between September 22, 1959 and January 29, 1962, it was not until the hearing held on October 11, 1962 that claimant's counsel questioned the authority of the Board to make awards of compensation to the claimant.

At the hearing before the Workmen's Compensation Board on March 27, 1963, claimant's counsel admitted that his client had accepted and retained the moneys awarded as compensation. The Board chairman stated (39):

> "We have no jurisdiction in maritime cases. But under Section 113 of our law, if the parties agree, we can accept and assume jurisdiction. I read that part of the chapter, the provision that the award—according to the provision of this chapter, the award may be made by the Board in respect of injury subject to the admiralty, or other federal laws. In this case, the claimant, the employer, and the insurance carrier waived their admiralty, and interstate clear rights and remedies."

The Appellate Division of the New York Supreme Court, Third Department, affirmed the decision of the Workmen's Compensation Board denying claimant's application to vacate the compensation awards. With respect to his contention that Workmen's Compensation Law §113 may not constitutionally be applied to maritime injuries sustained by seamen, the Court said (11):

> "Contrary to appellant's contention, the principles stated in *Meachem* [*Matter of Meachem* v. *New York Cent. R. R. Co.* (8 N Y 2d 293 [1960])] and in *Matter of Ahern* v. *South Buffalo Ry. Co.* (303 N. Y. 545, affd. 344 U. S. 367) are, in our view, applicable to this ac-

cident on a scow, and are not limited to waivers of liability arising out of cases which might otherwise be sued under the Federal Employers' Liability Act."

The New York Court of Appeals unanimously affirmed, without opinion.

ARGUMENT

The constitutional validity of Workmen's Compensation Law §113 was established by this Court in *South Buffalo R. Co.* v. *Ahern*, 344 U. S. 367. The sole question raised by this appeal—the constitutionality of the statute—is not a substantial constitutional question and the appeal should therefore be dismissed.

(1)

In *South Buffalo R. Co.* v. *Ahern*, 344 U. S. 367, the validity of Workmen's Compensation Law, §113 was challenged by an interstate carrier as being in unconstitutional conflict with the Federal Employers' Liability Act (45 U. S. C. §§51 *et seq.*). This Court sustained the constitutionality of the statute, holding that it did not conflict with the federal statute. The Court noted that §113 was merely "legislative authorization, *permitting* the Board to effectuate private agreements for compromising a federal controversy" (344 U. S., at p. 372).

The statute authorizes the Workmen's Compensation Board to make awards "in respect of injuries subject to the admiralty or other federal laws" where the parties waive "their admiralty or interstate rights and remedies."

The statute is permissive and not mandatory. "The difference between coercion and permission is decisive; New York's jurisdictional grant, so confined, does not transgress." (344 U. S., at p. 372.)

Appellant would restrict the principle of the *Ahern* case to employees engaged in interstate commerce and would deny its application to those engaged in maritime employment. This Court's opinion in *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147 (1917), effectively answers appellant's contention.

With the enactment by the Congress of the Federal Employers' Liability Act under the authority of the interstate commerce clause (Constitution, Art. I, Sec. 8, clauses 3 and 18) the entire field of injuries to railroad employees was completely pre-empted to the exclusion of State enactments in the same field. Among the enactments so interdicted are State workmen's compensation laws. Such was the holding of this Court in *New York Central R. R. Co.* v. *Winfield, supra*, 244 U. S. 147, which involved the New York Workmen's Compensation Law.

In holding that the *compulsory* provisions of the State statute could not constitutionally apply to interstate commerce employees, the Court stated that the Federal Act (FELA) is "comprehensive and also exclusive" (p. 151); it is "paramount and exclusive" (p. 152); where "the injury occurred while the carrier was engaged and the employee employed in interstate commerce the federal act governs to the exclusion of the state law" (*ibid.*).

In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), decided the same day as *Winfield*, this Court established the

supremacy of the maritime law, as fixed and determined by the Congress, to the exclusion of State statutes purporting to operate in that field. *Jensen* and *Winfield* are companion cases in that both excluded the New York Workmen's Compensation Law from jurisdiction, the one over seamen (*Jensen*) and the other over interstate railroad employees (*Winfield*).

In *Jensen*, this Court drew an analogy between the power of the States to legislate with respect to maritime matters and their power to legislate on matters affecting interstate commerce. The Court said (244 U. S., at pp. 216-217):

> "A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now fairly established. 'Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations' * * * And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved."

The supremacy of federal law is as absolute and complete with respect to seamen as it is to interstate commerce employees. Appellant's position seems to be that the ouster of the States' jurisdiction is more complete in the case of seamen's injuries than it is in the case of injuries sustained by employees engaged in interstate commerce. But the exclusion of the States as to the latter is complete and unqualified. There are no degrees of exclusiveness of jurisdiction in either field.

The complete ouster of the States' jurisdiction over interstate commerce injuries effected by the enactment of FELA extends to the coercive provisions of the Workmen's Compensation Law but not to the permissive provisions contained in §113. Such was the holding of this Court in *South Buffalo R. Co.* v. *Ahern, supra.* Appellant presents no reason why the principle of *Ahern* is inapplicable to maritime injuries, as to which the supremacy of the maritime law is no more absolute than is FELA.

(2)

Appellant's Jurisdictional Statement mentions alleged misrepresentations to him by his employer. The record shows that from August 3, 1960 to the termination of the hearing before the Workmen's Compensation Board in 1963, appellant was represented by his present attorneys, who are specialists in admiralty law (16). For reasons best known to them they continued to submit his claim for compensation to the Board until full payment of compensation was made to the appellant.

Appellant's submission to the Board's jurisdiction with the consent and, presumably, the advice, of his attorneys was untainted by fraud or overreaching. In *Heagney* v. *Brooklyn Eastern District Terminal,* 190 F. 2d 976 (2nd Cir., 1951), cert. den. 342 U. S. 920 (1952), the Court said (p. 978):

> "If there is ever to be any settlement of legal claims we feel that it must be in a case such as this where a claimant before an administrative board is adequately represented by counsel over a long period [from September 25, 1947 to January 6, 1949], during which the

> rights, potential and actual, of the client are perfectly obvious to anyone with the slightest legal training, and *where there is no suggestion of fraud or concealment from the lawyer on the part of the employer.*" (Emphasis supplied.)

(3)

The sole issue presented by the claimant's appeal--the constitutionality of Workmen's Compensation Law, §113—has been shown to be insubstantial. Treating appellant's papers as an application for a writ of certiorari (28 U. S. C., §2103), it is submitted that the application should be denied.

In 1962 the Legislature of the State of New York amended the Workmen's Compensation Law by eliminating from the coverage of that statute employees of the Department of Sanitation of the City of New York. Chapter 551 of the New York Laws of 1962 amended Workmen's Compensation Law, §3, subd. 1, which sets forth the employments to which the statute applies, by adding the following clause to §3, Group 17:

> "but employment in the department of sanitation of the city of New York in the sanitation service classification of the classified civil service of such city shall not be within the coverage of this chapter."

The amendment of the statute renders this case "episodic" (*Rice* v. *Sioux City Cemetery,* 349 U. S. 70, 74 [1955]) and "of no importance save to the litigants themselves" (*Rudolph* v. *United States,* 370 U. S. 269, 270 [1962]). Under the circumstances, if appellant's papers be treated as an application for a writ of certiorari, the application should be denied.

CONCLUSION

The appeal should be dismissed.

August 9, 1965.

Respectfully submitted,

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IN THE

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WALTER E. BRAADT,

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vs.

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Department of Sanitation (self-insurer),

Respondent,

vs.

WORKMEN'S COMPENSATION BOARD,

Respondent.

(W. C. B. No. 05994124)

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

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Cases Cited

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(W.C.B. No. 05994124)

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

Appellant, seaman, Walter E. Braadt, pursuant to Rule 16 (3) of the Revised Rules of this Court, files this brief in opposition to appellees' motions to dismiss the appeal herein on the alleged ground that the appeal does not present a substantial constitutional question.

Statement

There is no dispute to the facts that on September 20, 1959 Walter E. Braadt was injured in the course of his employment as a deck hand aboard the city's vessel, a scow, then in navigable waters of Fresh Kills Creek, Staten Island, New York. At the time of the occurrence the scow was in tow and caused to come in violent collision with other vessels, throwing Braadt off balance and causing him to sustain serious spinal and related disabling injuries.

Braadt's employer, The City of New York, placed him under New York Workmen's Compensation by filing a report of this injury with the Board on October 23, 1959.

Braadt accepted Compensation payments in reliance upon his employer's misrepresentation that the accident occurred in a non-navigable waterway.

Subsequently, in the summer of 1962, Braadt learned for the first time that Fresh Kills Creek where he was injured was in fact a navigable body of water. Accordingly, he then brought an action in the U. S. District Court for the Southern District of New York claiming the benefit of the Jones Act, Title 46 U.S.C. §688 and under the General Maritime Law for injuries received by him as a result of this accident.

On October 11, 1962, at a hearing before the Workmen's Compensation Board appellant's attorneys requested that testimony should be taken by the referee on Braadt's status as a *seaman* at the time of accident.

The referee refused to take such testimony claiming the Board was never put on notice as to this issue.*

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* As early as February 29, 1960, Braadt wrote a letter to the Workmen's Compensation Board requesting an immediate hearing to determine whether his claim was a maritime or compensation matter. See p. 15 of the Transcript of the Record on Appeal.

On December 10, 1962 appellant's attorneys via letter to the Board objected to the referee's decisions and awards, requesting that they be vacated because of complete absence of local jurisdiction—as appellant was proceeding under the applicable federal provisions of the Maritime Law.

On March 27, 1963 at a hearing before the Workmen's Compensation Board, request was again made that testimony be taken on the question of appellant's classification as a seaman. (See Minutes, W.C.B., dated March 27, 1963, pp. 39, 40 of Transcript of Record on Appeal). At this time respondent, City of New York, conceded that at the time the accident occurred, the vessel was in fact in navigable waters. However, the Board refused to take such testimony holding that even as a "seaman" Braadt had waived his General Maritime Law rights and remedies by utilizing the Board's machinery. (See Jurisdictional Statement, Appendix A, p. 12 and Minutes, W.C.B. dated March 27, 1963, pp. 38-42, Transcript of Record on Appeal.)

ARGUMENT

The constitutionality of Section 113, New York Workmen's Compensation Law presents a substantial constitutional question that has not heretofore been determined, as it relates to a seaman injured in the course of his employment on navigable waters. This court should strike down the State's usurpation of a power which belongs exclusively within the Federal Maritime jurisdiction under Article 111, §2, U. S. Constitution.

(1)

The General Martime Law was received and incorporated into the laws of this nation through the constitutional provision which extends to the Judiciary of the United States

"* * * all cases of admiralty and maritime jurisdiction * * *". Article 111, Section 2, Constitution of the United States.

The Supreme Court in *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, explained the meaning of this Constitutional provision as follows:

> "Such a law or system of law existed in colonial times and during the Confederation, and only was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the General Maritime Law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down and abrogate a system, but to place the entire subject—its substantive as well as procedural features—under national control because of its intimate relation to navigation and interstate and foreign commerce. In pursuance of that purpose, the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this Court, gave effect to it * * *. *After the Constitution went into effect, the substantive law theretofore enforced was not regarded as superseded, as being only the law of the several States, but as having become the law of the U. S.*—subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the

entire subject and permits of the exercise of a wide discretion. *But there are limitations which have come to be well recognized. One is that there are boundaries to the Maritime Law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislators, as by excluding a thing falling clearly within them or including a thing falling clearly without* * * *" (Italics supplied).

With respect to waiver of federal rights and remedies, the appellees rely on the Federal Employees Liability Act case of *Southern Buffalo R.R. Co.* v. *Ahern,* 303 N. Y. 545.

However, appellant urges that in the instant case the basic constitutional issues squarely before this Court are: (1) Whether the *means* (use of the machinery of the N. Y. State Workmen's Compensation Board) whereby the instant seaman's *dispute* was *settled* violates public policy and, (2) Whether the inherent boundaries to the federal maritime law and admiralty jurisdiction has been unconstitutionally altered by Section 113 of the New York State Workmen's Compensation Law.

These issues were not considered, let alone determined in *South Buffalo R.R. Co.* v. *Ahern,* 344 U. S. 367; *Meachem* v. *N. Y. Central R.R. Co.,* 8 N. Y. 2d 293 (1960); nor in *Heagney* v. *Brooklyn Eastern District Terminal,* 190 F. 2d 976, *cert. den.* 342 U. S. 920.

The State does not have jurisdiction over personal injuries sustained by seamen while in the course of their employment on navigable waters, *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Washington* v. *Dawson & Co.,* 264 U. S. 219; *Lindgren* v. *U. S.,* 281 U. S. 38; *W. J. McCahan Sugar Refining & Molasses Co.* v. *Stouffel,* 41 F. 2d 651 (3rd Cir. 1930); *Schellenger* v. *Zubik,* 170 F. Supp. 92 (D. C. Pa.

1959). It has long been and still is basic law that the parties cannot confer jurisdiction over the *subject matter* to the State where the State cannot constitutionally have such power.

The issues presented here are not degrees of exclusiveness of jurisdiction, but the jurisdictional power of the State over the subject matter itself in the first instance.

The Court below based its jurisdiction over the subject matter on the theory that there was a *maritime but local* exception to the General Maritime Law which could confer jurisdiction on the State over seaman's personal injury claims suffered while in the course of his employment on navigable waters. *Grant Smith-Porter Shipping Co.* v. *Rhodes,* 257 U. S. 469. See Appendix B, page 15 of the Jurisdictional Statement. However, *Grant Smith-Porter Shipping Co.* v. *Rhodes, supra,* and all cases in which the *maritime but local* doctrine was applied, involved harbor workers or longshoremen. This *martime but local* doctrine has never been applied and does not apply to a "seaman's case." *Gahagan Construction Corp.* v. *Armao,* 165 F. 2d 301 (1st Cir. 1948) *cert. den.,* 333 U. S. 876.

With the passage of the Longshoremen's and Harbor Workers Act, the *maritime but local* doctrine is in serious disrepute, *Calbeck, et al.* v. *Travelers Ins. Co.,* 370 U. S. 114; *Michigan Mutual Liability Co., et al.* v. *Arrien et al.,* 344 F. 2d 640 (2nd Cir. 1965), serves no useful purpose, unnecessarily depreciates from the inherent federal constitutional maritime power and attempts to create, with respect to seaman's cases, a confusing judicial "twilight zone". This attempt should be rejected.

With respect to personal injuries sustained by seamen, Congress has stated that there exclusive remedies shall be the Jones Act, 46 U. S. C. §688, and General Maritime Law.

Congress has also stated that seamen shall not be entitled to Federal Workmen's Compensation, expressly excluding them from the Longshoremen's and Harbor Workers Act, 33 U. S. C. §902 (3); Vol. 68, Part 5, Congressional Record (69th Congress, 2nd Session) pp. 5402, 5403, 5410, 5411 and particularly p. 5414.

While the wording of the Jones Act, 46 U. S. C. §688 is "permissive", the language of the Act does not permit a seaman to elect to pursue the remedy provided in the Workmen's Compensation Law. A Seaman has no remedy in State or Federal Workmen's Compensation.

The phrase "may, at his election", which appears in the Jones Act, 46 U. S. C. §688, was explained in *Panama R.R. Co .v. Johnson,* 364 U. S. 375 as follows:

> "*Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of Maritime Law, nor enables a seaman to do so.* On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by old rules or that provided by the new rules. *The election is between alternatives accorded by the Maritime Law, as modified, and not between that law and some non-maritime system.*" (Italics supplied.) *Panama R.R. Co.* v. *Johnson,* 264 U. S. at p. 388.

It is immaterial in the instant case whether Section 113 of the N. Y. State Workmen's Compensation Law is "permissive" or "coercive" with respect to seamen's General Maritime Law and Jones Act rights and remedies as Workmen's Compensation Laws were unknown at the time of the ratification of the U. S. Constitution, and since then have never been part of the "maritime system". As such,

State Workmen's Compensation Laws for seamen are in conflict with Article III, Section 2 of the U. S. Constitution, as they are clearly without the boundaries and ambit of the admiralty and maritime jurisdiction, which was exclusively granted to the Federal Government. *Panama R.R. Co.* v. *Johnson, supra.*

While it is true that the Maritime Law is not stagnant and grows as changing times and needs dictate, there is no public policy which would require or necessitate *permissive* Workmen's Compensation for seaman, as seaman's rights now under the Jones Act and the General Maritime Law, as interpreted by this Court, are far more liberal than Workmen's Compensation Acts. With respect to seaman there is no void in the existing maritime law whereby a seaman would be remediless if injured in course of his employment. There is no need to create a *martime but local* exception for their protection.

(2)

The seaman has a singular status in Maritime Law. His contractual dealings with his employer are as carefully watched by the Courts as though he were a minor or a young heir. He is, in contemplation of the Maritime Law, a ward of the Admiralty Courts.

The application of the waiver provisions of Section 113 of the Workmen's Compensation Law effectuates a release of the seaman's maritime rights and remedies. With respect to releases given by seaman, this Court has held that the Maritime Law goes far beyond questions of fraud and misrepresentation (which exists in the instant case) and holds that it is the burden of the employer, the one who sets forth the release to show that it was executed freely, without deception and without coercion. The employer has the burden of proof of showing that the seaman was not over-

reached—that he signed the release with full understanding of his rights. *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U. S. 239.

The Courts below held that the waiver and release of appellant-seaman's maritime rights and remedies was effectuated pursuant to Section 113 of the Workmen's Compensation Law when the:

> "* * * parties . . . utilized the board's machinery at a series of hearings resulting in a series of awards as well as payment and acception of these awards * * *"

New York State Workmen's Compensation Board memorandum of decision filed June 5, 1963, WCB case number 05994124 (See Appendix A, Jurisdictional Statement, p. 12) and See *Braadt* v. *The City of New York and Workmen's Compensation Board*, 21 App. Div. 2d 957; 251 N. Y. S. 2d 376 (3rd Dep't 1964), *aff'd, no opinion* 15 N. Y. 2d 875, 258 N. Y. S. 2d 413 (1965). (See Appendix B, Jurisdictional Statement, pp. 13, 14).

Contrary to the Maritime Law, Section 113 of the New York State Workmen's Compensation Law does not require any proof to be presented by the seaman's employer that: (1) The waiver and release be executed freely by the seaman; (2) That there was no deception or coercion and; (3) That the seaman fully understood his rights and remedies.

The absence of these basic General Maritime Law requirements in the execution of releases and the waiver of the seaman's maritime rights and remedies renders the application of Section 113 of the Workmen's Compensation Law repugnant to Article III, Section 2 of the U. S. Constitution.

The record shows that appellant was doing traditional seaman's work at the time of his accident, *cf. Usiak* v. *N. Y. Tank & Barge Co., Inc.*, 299 F. 2d 808 (2nd Cir. 1962); *Mach* v. *Penn R.R. Co.*, 207 F. Supp. 233 (D. C. Pa. 1962); and that he was overreached by his employer.

Under the circumstances of overreaching, acceptance of compensation payments cannot be considered a release, compromise and/or accord and satisfaction of appellant's rights under the Jones Act and General Maritime Law. *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U. S. 239.

It is clear that the validity of the "compensation agreement" raises a Federal question to be resolved by Federal law. *cf. South Buffalo R.R. Co.* v. *Ahern*, 344 U. S. 367.

It is impossible to have a full and fair compromise of a Jones Act and General Maritime Law case which is tainted by fraud and overreaching of the seaman. Such a "compromise" clashes with the General Maritime Law and Jones Act, as well as all equitable principles. *Cf. South Buffalo R.R. Co.* v. *Ahern, supra; Garrett* v. *Moore-McCormack, supra.*

It should be noted that in the *Ahern, supra; Meachem, supra;* and *Matter of Haglund* v. *Morse Drydock & Repair Co.*, 255 App. Div. 895, cases,—one of the most important considerations of the Court was the finding of an equitable estoppel against the employer preventing it from raising the issue of jurisdiction after the Statute of Limitations had run against any claim which the employee's estate could make against his employer under the Federal Statutes.

Here, unlike the above cases, there is no prejudice to any of the parties. The appellant has a Jones Act and General Maritime Law (including maintenance and cure) suit presently pending on the Trial Calendar of the U. S. District Court, Southern District of New York.

The payments made to appellant under the Compensation Act of course would be credited to the City against the amount appellant is entitled to receive under the maritime law. *Calbeck et al.* v. *Travelers Ins. Co.*, 370 U. S. 114.

In addition, the *Ahern* and *Meachem* principles cannot be applied because there cannot be a waiver unless there is an intentional relinquishment of a *known* right. *Meachem*, 169 N. E. 2d at p. 917. The appellant did not know of his rights under the General Maritime Law until approximately two and a half years after his accident, when he immediately instituted a Jones Act and General Maritime Law suit.

CONCLUSION

The rulings and decision of the Appellate Division affirmed without opinion by the Court of Appeals clearly brings this case within the jurisdictional provision of Title 28 U. S. C. §1257 (2) conferring appellate jurisdiction on this Court.

The federal constitutional questions presented are of first impression to this Court, are determinative factors of the inherent boundaries of the General Maritime Law and as such, are of so substantial a nature as to require plenary consideration, with briefs on the merits and oral argument for their resolution by this Court.

Dated: New York, N. Y.,
August 26, 1965.

Respectfully submitted,

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